IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1579

GRAND LODGE OF FREE AND ACCEPTED MASONS,
MASONIC HOME,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, AFL-CIO,
LOCAL 1511 AND COUNCIL 55,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CLARK, HARDY, LEWIS, FINE
and ASHER, P.C.
By: Charles Fine
Attorneys for Petitioner
555 S. Woodward, 7th Floor
Birmingham, Michigan 48011
Phone: (313) 645-0800

GRIFFITHS & GRIFFITHS
By: Hicks G. Griffiths
Attorney for Petitioner
P.O. Box 407
Romeo, Michigan 48065
Phone (313) 752-4400

Interstate Brief & Record Co., 1615 Abbott St., Detroit, Michigan 48216
962-8745

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, GRAND LODGE OF FREE AND ACCEPTED MASONS, MASONIC HOME (herein "Petitioner"), prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in the above case on February 15, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is not yet officially reported. The decision and order of the National Labor Relations Board (herein the "NLRB") (Appendix B) is reported at 215 NLRB No. 24. The decision and order of the NLRB on reconsideration (Appendix C) is reported at 220 NLRB No. 206.

JURISDICTION

The judgments of the United States Court of Appeals for the Sixth Circuit were made and entered on February 15, 1977. The jurisdiction of this Court is invoked under 28 USC §1254 (1).

QUESTIONS PRESENTED

1. Did the lower court, by refusing to review the credibility determinations of the Administrative Law Judge fail to apply the principles enunciated by this Court in *Universal Camera Corporation* v *N.L.R.B.*, 340 US 474 (1951), regarding judicial review of NLRB decisions?

2. Did the decision of the lower court sanction a decision of the NLRB which so far departed from the accepted and usual course court of quasi-judicial proceedings and conduct as to call for an exercise of this Court's power of supervision?

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 USC, Sec. 151, *et seq.* (the "Act") are set forth herein:

> Sec. 8(a) (5) It shall be an unfair labor practice for an employer — . . . to refuse to bargain collectively with representatives of his employees, subject to the provisions of Sec. 9(a).
>
> Sec. 10(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of facts and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: . . .
>
> Sec. 10(f) Any person aggrieved by a final order of the Board granting or denying a whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States . . . Upon filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part

the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

STATEMENT OF THE CASE

Petitioner owns and operates a non-profit nursing home for the aged which includes a non-profit hospital that provides basic, intermediate, and intensive care to its residents and patients. Petitioner is a non-profit fraternal, charitable organization incorporated in Michigan since 1826.

Petitioner and Local No. 1511, Council 55, American Federation of State, County and Municipal Employees, AFL-CIO (hereinafter referred to as the "Union"), were parties to a collective bargaining agreement, the duration of which was from December 1967 through December 31, 1969. When the parties were unable to consummate a successor agreement, the Union called and caused a strike to commence on February 5, 1970, and continued said strike until December 5, 1970, at which time the Petitioner and the Union executed a successor collective bargaining agreement.

The strike was punctuated with threats, violence and misconduct culminating in an Injunction Order and Contempt Citation. However, the parties continued to meet and negotiate. During the negotiation meetings in February through July, Petitioner set forth the various acts of misconduct.

By letter, dated July 14, 1970, Petitioner notified the Union that certain employees would not be returned to

work subsequent to the strike. The two categories of employees were listed as those who would be terminated as a result of the reduction of personnel and those who had engaged in misconduct. The letter specifically set forth a request to negotiate these matters with the Union. As the last paragraph in the letter stated:

> "Please communicate with me as to a date for negotiations on the above items."

Petitioner never received an answer to this letter and each time the matter was raised by Petitioner, it was deferred by the Union.

On July 22, 1970, the Home provided the Union with a complete written contract proposal. This proposal represented many changes and concessions from the previous negotiating positions taken in the earlier months of negotiations. Petitioner asked, and the Union agreed, to have the proposed contract submitted to the employees for ratification. The Union advised Petitioner on July 23, 1970, the employees had rejected the proposed contract because the terms therein were not sufficient.

While negotiations on the terms of the contract continued to be negotiated, the parties also traded proposals for the eventual return of strikers upon settlement of the contract. Petitioner had continued to operate the nursing home and hospital during the strike with employees who (1) did not strike, (2) had quit the strike and returned to work, and (3) were hired during the strike.

On August 10, 1970, the Union submitted a proposal that called for the "immediate call-back of all employees who are presently on strike." The proposal called for such call-back via the recall procedures of the proposed

agreement. Such proposal was rejected and in an August 11 telegram, the Union proposed that strikers not returned to work at the conclusion of the strike would have "access to the final step of the grievance procedure." By letter, dated August 24, 1970, Petitioner rejected the Union's proposal, giving explanation therefor, and requested further negotiations on the two categories of non-returning strikers (i.e., those who would not be returning due to a reduction in personnel and those who had engaged in misconduct). The Union did not respond to said letter.

On September 29, 1970, in a negotiation meeting with the Chairman of the Michigan Employment Relations Commission, who was acting in the role of a mediator, he advised Petitioner that the Union had given him a list of strikers who would not be returning to work. As the various acts of misconduct had been discussed during the meeting, Petitioner was asked to provide a list of strikers who were suspected of having engaged in misconduct so that he could compare it with the Union's list. Ultimately, after comparing the lists, the Chairman assured Petitioner that there would be no problem in the reinstatement of strikers at the conclusion of the strike. This is borne out by the Chairman's letter to the parties, dated October 8, 1970, wherein he said:

> "I also believe the apparent dispute concerning the employees who will return, and will not return, will not be as difficult as it appears to be on the surface."

While negotiation meetings and communications continued, there was no further mention of strikers. By letter, dated November 11, 1970, Petitioner set forth with

particularity the procedure for the return of strikers and the names of those that would be returned. The letter set forth, in part:

> "In my July 14 and August 24, 1970, letters to you, I brought to your attention the findings of overstaffing, the inability to reinstate all strikers, the termination as a result of the reduction in personnel, and the conclusion that the strikers who engaged in acts of misconduct would be the first to be determined unqualified and un-reinstateable.
>
> * * *
>
> Since we have heard nothing from you, we have interpreted this to mean that you are leaving the entire decision to the Employer and no longer wish to discuss it . . ."

At the conclusion of the letter, Petitioner once again asked the Union to communicate if it had any questions. However, the Union neither questioned, queried, commented upon, nor in any other way communicated with Petitioner about the subject matter of the November 11, 1970 letter.

The strike terminated on December 5, 1970, at which date, the parties executed a successor collective bargaining agreement. Eighty-two strikers were not re-employed at the termination of the strike. The Union thereafter initiated a grievance seeking reinstatement of the strikers. The grievance was heard by an arbitrator, who upheld the Petitioner's position.

REASONS FOR GRANTING THE WRIT

This case presents to the Court an opportunity to affirm and clarify its landmark decision in *Universal Camera*, wherein the "substantial evidence test" upon judicial review of NLRB decisions was analyzed and interpreted.

The Sixth Circuit Court's interpretation of this Court's directive in *Universal Camera* that has been formulated during the last twenty-six years is inconsistent with sister circuits and repugnant to the *Universal Camera* doctrine itself.

The lower court failed to review the Administrative Law Judge's credibility determinations in a manner consistent with the standards of review established by this Court in *Universal Camera*. The lower court's blind deference to credibility findings of the NLRB's Administrative Law Judge is contrary to its proper review function and inconsistent with the practice and decisions of other circuit courts.

The scope of review actually applied by the lower judicial court severely reduces the likelihood of securing reversal of NLRB decisions, notwithstanding the propriety of such reversal.

The proper judicial scope of review of the NLRB's findings of fact is set forth at 29 USC 160(f), which provides in relevant part as follows:

> Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or

> restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; *the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.* (Emphasis supplied.)

As determined by this Court in *Universal Camera*, the above-described statutory scope of judicial review must not be limited to a one-sided examination of the record in search of evidence that tends to support the NLRB's findings and conclusions. Rather, the Circuit Court of Appeals must examine the record as a whole including evidence that the NLRB has failed to discuss or rely upon. Toward this meaning, this Court stated that:

> "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." 340 US 474, 488.

Credibility determinations that are tantamount to the NLRB's findings of fact must thus also be supported by substantial evidence on the record considered as a whole. *NLRB* v. *Florida Citrus Canners Co-operative*, 288 F. 2d 630 (5th Cir. 1961).

Furthermore, the Administrative Law Judge's credibility findings are not to be "given more weight than in reason and in the light of judicial experience they deserve," *Universal Camera*, 340 US 474, 496.

With the apparent exceptions of the Courts of Appeals for the Second and Sixth Judicial Circuit, other circuit courts have heretofore properly interpreted the *Universal Camera* scope of review to require questioning and close

examination of the inferences drawn and findings made where the Administrative Law Judge has uniformly credited evidence of the General Counsel and generally disbelieved the evidence of the employer,[1] as occurred in the instant case.

In *NLRB* v *Dinion Coil Co.*, 201 F. 2d 484 (2nd Cir. 1952), the Court interpreted *Universal Camera* as precluding the examiner's credibility determinations from the substantiality-review test. As the Court set forth in *Dinion*,

> ". . . we surely may not upset the Board when it accepts a finding of an Examiner which is grounded upon (a) his disbelief in an orally testifying witness' testimony because of the witness' demeanor or (b) the Examiner's evaluation of oral testimony as reliable, *unless on its face it is hopelessly incredible* — [citation omitted] or flatly contradicts either a so-called 'flaw of nature' [citation omitted] . . ." 201 F 2d at 490 (Emphasis supplied.)[2]

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[1]*NLRB* v. *Florida Citrus Canners Co-op.* (Supra)
NLRB v. *Miami Coca-Cola Bottling Co.*, 222 F. 2d 341 (5th Cir. 1955)
NLRB v. *Cosco Products Co.*, 280 F. 2d 905 (5th Cir. 1960)
NLRB v. *Isis Plumbing & Heating Co.*, 322 F. 2d 913 (9th Cir. 1963)
See also, *Montgomery Ward & Co.* v. *NLRB*, 374 F. 2d 606 (10th Cir. 1967).

[2]See also, *NLRB* v. *James Thompson & Co.*, 208 F. 2d 743 (2nd Cir. 1953).

Apparently, the Court of Appeals for the Sixth Judicial Circuit has adopted the *Dinion* "hopelessly incredible" requirement as a basis for reviewing credibility resolutions of NLRB trial examiners. While not setting forth the *Dinion* requirement, the Court refused to review the credibility resolution of the examiner in *NLRB* v. *Cambria Clay Products Co.*, 215 F. 2d 48 (6th Cir. 1954), even though the credited witness "was an ex-convict, with a grudge against the company."

The Sixth Circuit Court stated its rule on credibility resolutions in *NLRB* v. *Bendix Corporation*, 299 F. 2d 308 (6th Cir. 1962), when it set forth:

> "It is well settled that the credibility of the witnesses and the reasonable inferences to be drawn from the evidence are matters for determination by the Trial Examiner and the Board."

The Court failed to apply the *Universal Camera* test requiring review of credibility resolutions and inferences therefrom within the substantial evidence *of the whole record*. In other words, the Court declined to determine if the credibility resolutions were substantiated upon the entire record.

It is respectfully submitted that the Court below acceded to the same failing in the instant case. The Court refused to specifically examine the credibility resolution in light of the entire record. The Court uncritically accepted the credibility resolution and, once doing so, drew inferences therefrom which established the basis that the Administrative Law Judge and Board decision was supportable by substantial evidence.

Thus, the lower court's stated refusal to review the "credibility resolutions" of the Administrative Law Judge, necessarily results in a refusal to review the findings of fact so inextricably interwoven within the resolution of credibility. A witness' testimony of alleged facts may only be credited if such alleged facts can successfully withstand competition with competing facts found in the record as a whole.

In the instant case, the crediting of one witness established the entire premise for the inferences (i.e., facts) to be drawn. Without the crediting of the Union witness, there was no independent evidence to support the conclusions of the Administrative Law Judge and NLRB. The court below refused to analyze the testimony of the witness in order to perceive if the NLRB's inferences were proper. Apparently, the lower court, for reasons of judicial efficiency or misapprehension of its responsibility upon appeal from NLRB decisions, has adopted a rubber-stamp approach to review of Administrative Law Judge's credibility findings.

The Court's enduring caveat in *Universal Camera* that circuit courts must not function as a mere "judicial echo" of the NLRB has been and continues to be emasculated by the lower court.

Wherefore, for the purposes of insuring public confidence in the integrity of the judicial system and to provide for uniformity throughout the circuit courts, the Petitioner prays that this Petition for Writ of Certiorari be granted and ultimately that the decision of the NLRB and the Court below be reversed as to the finding of Employer unfair labor practices.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

CLARK, HARDY, LEWIS, FINE
and ASHER, P.C.

By: CHARLES FINE
Attorneys for Petitioner
555 S. Woodward, 7th Floor
Birmingham, Michigan 48011
(313) 645-0800

GRIFFITHS and GRIFFITHS

By: HICKS G. GRIFFITHS
Attorneys for Petitioner
P.O. Box 407
Romeo, Michigan 48065
(313) 752-4400

Dated: April 1977

APPENDIX A

ORDER

(United States Court of Appeals
For The Sixth Circuit)

(Filed February 15, 1977)

Before WEICK, CELEBREZZE and PECK, Circuit Judges.

Upon consideration of the entire record and the arguments and briefs of counsel, we are of the opinion that the order of the Board is supported by substantial evidence, and that the Board did not commit any error of law in its decision.

It is therefore ORDERED that the order of the Board be enforced.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX B

DECISION AND ORDER

FJP

D—9352
Alma, Mich.

215 NLRB No. 24

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Grand Lodge of Free and
Accepted Masons, Masonic Home
and
Local No. 1511 and Council
No. 55, American Federation
of State, County and
Municipal Employees, AFL-CIO

Cases 7—CA—8158 and
7—CA—10030

On May 22, 1974, Administrative Law Judge Thomas F. Maher issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. The Charging Party filed a brief in answer to Respondent's exceptions and in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Administrative Law Judge and hereby orders that Respondent, Grand Lodge of Free and Accepted Masons, Masonic Home, Alma, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D. C. November 25, 1974.

John H. Fanning, Member

Howard Jenkins Jr., Member

John A. Penello, Member
National Labor Relations Board

(Seal)

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[1]The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the revelant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

APPENDIX C

DECISION AND ORDER ON RECONSIDERATION

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Grand Lodge of Free and
Accepted Masons, Masonic Home
and
Local No. 1511 and Council
No. 55, American Federation
of State, County and
Municipal Employees, AFL-CIO

Cases 7—CA—8158 and
7—CA—10030

On November 25, 1974, the Board issued its initial Decision and Order[1] in this case affirming the Administrative Law Judge's rulings, and conclusions and adopting his recommended Order. Thereafter the Board notified the parties of its decision to reconsider this case, *sua sponte*, and invited the parties to submit supplemental briefs. The Board directed the parties' attention to the question of whether, at the time of the Union's failure to comply with Section 8(d) of the Act, it was unclear that the Board would assert jurisdiction over nonprofit nursing homes. Respondent, Charging Party, and counsel for the General Counsel filed supplemental briefs in response to the Board's invitation.

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[1]215 NLRB No. 24.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reconsidered the record and the Administrative Law Judge's Decision in light of the supplemental briefs and has decided to reaffirm its initial Decision and Order.

Although on reconsideration we reaffirm our earlier decision, we believe the complicated issues of law and policy raised by the application of Section 8(d) of the Act to the facts of this case merit further discussion.[2]

Before the Administrative Law Judge and in its brief to the Board, Respondent argued that when the Union struck on February 5, 1970, it knew or had reason to know that the Board had jurisdiction over, and would assert jurisdiction over, nonprofit nursing homes. Respondent contends that the failure of the Union to comply with Section 8(d) (3) by giving notice to the Federal Mediation and Conciliation Service rendered the strike illegal at its inception and deprived strikers of any right to reinstatement.[3] In its supplemental brief Respondent also

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[2]A chronological history of events leading to the issuance of the complaint as well as an analysis and resolution of issues not immediately relevant to this discussion is contained in the Administrative Law Judge's Decision and need not be repeated here.

[3]See *Fort Smith Chair Co.*, 143 NLRB 514 (1963), Member Fanning dissenting, enfd. *sub nom. United Furniture Workers of America, AFL-CIO, and Local 270, etc.* v. *N.L.R.B.*, 336 F.2d 738 (C.A.D.C., 1964), cert. denied 379 U.S. 838 (1964).

presses its exception to the Administrative Law Judge's refusal to give retroactive effect to the Board's assertion of jurisdiction over nonprofit nursing homes.[4] With respect to this issue Respondent maintains that the Administrative Law Judge's Decision departs from a long-established Board policy of applying new or changed jurisdictional standards to pending cases, even when such an application of new standards has a retroactive effect. Respondent argues that this policy is reflected in prior Board decisions including *Lakeland Convalescent Center, Inc.*, 173 NLRB 97 (1968), and *Siemons Mailing Service*, 122 NLRB 81 (1958).

Turning first to Respondent's contention that the Union should be charged with having knowledge that the Board would assert jurisdiction over Respondent's operations, we are satisfied that under the circumstances here this contention must be rejected. In urging that we find otherwise, Respondent points out that a "sister union" of the Charging Party brought a successful suit in district court in 1968 challenging the Board's action dismissing a representation petition filed in *Drexel Home Inc., supra*. Hence, according to Respondent, the Charging Party had "notice and reason to believe" that the Board would assert jurisdiction here. The problem with this argument, however, is that when the strike began in February 1970 the Board had not yet asserted jurisdiction over no profit nursing homes and such jurisdiction was not asserted until some 5 months later.[5] Even if the Union was aware

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[4]As indicated previously, the strike began in February 1970 and continued until December 1970. The Board did not assert jurisdiction over nonprofit nursing homes until June 2, 1970. See *Drexel Home, Inc.*, 182 NLRB 1045 (1970).

[5]The relevant provisions of Sec. 8(d) are directed toward the period of time 60 to 30 days prior to the commencement of a strike resulting from the termination or modification of an existing contract.

that the jurisdictional issue was then pending before the Board, we fail to see how the Union could have predicted in February 1970 either the outcome of the *Drexel* litigation or the timing of the Board's decision in that case, or, for that matter, the duration of the strike. Accordingly, we are not inclined to penalize the Charging Party for what can best be described as an understandable lack of prescience.

We also reject Respondent's contentions concerning the supposed retroactive effect of the Board's assertion of jurisdiction over nonprofit nursing homes. With respect to this issue Respondent maintains that when the Board announced its new jurisdictional standard in *Drexel* the notice provisions of Section 8(d) (3) became applicable to the instant labor dispute and made the Union's strike unlawful, *ab initio*. Respondent's position in this regard is apparently bottomed on the fact that the Board ordinarily applies new or changed jurisdictional standards to all pending cases. Thus Respondent relies on the line of authority represented by cases such as *Lakeland Convalescent Center, supra*, and *Siemons Mailing Service, supra*, and maintains that these cases demonstrate a Board policy not to permit a party (here, the Union) to "benefit" by its violations of the Act. Finally, Respondent relies on *Local Union 219, Retail Clerks International Association, AFL-CIO* [*Carroll House Belleville*] v. *N.L.R.B.*, 265 F.2d 814 (C.A.D.C., 1959), in support of its argument that in any event the failure of the Union to call off the strike in June 1970 and to proceed thereafter in strict compliance with the notice provisions of Section 8(d) (3) constituted a "recurring" violation of the Act.

We think Respondent's argument as outlined above is wide of the mark. The question here is not whether the Board should apply new or changed jurisdictional standards retroactively but rather, given the circumstances of this case, what are the retroactive effects, if any, of the Board's assertion of jurisdiction over the nonprofit nursing home industry.[6] With respect to this question the most salient fact of this case is that at the time that the Union struck it was under no legal duty, or other obligation, to proceed in accordance with the notice provisions of Section 8(d) (3) because the Board had not asserted jurisdiction and would not do so for several months. Under these circumstances, no subsequent action of the Board in asserting jurisdiction over nonprofit nursing homes can be treated as relating back to the start of the strike so as to create a legal duty or obligation where none existed before. For the same reason, Respondent's argument that the Union's conduct constituted a "recurring" violation of the Act that the Union could have "cured" must also fall. Simply

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[6]Hence Respondent's reliance on *Lakeland* and similar cases is misplaced inasmuch as those cases involved substantive rather than procedural violations of the Act by respondents who argued that these violations could not be remedied by the Board because they occurred prior to our assertion of jurisdiction over the operations involved. As we explained in *Siemons* in concluding that we could reach and remedy the violations in such cases:

> In the final analysis what is conclusive with us is the fact that any other policy would benefit the party whose actions transgressed the provisions of the Act at the expense of the victim of such actions and of public policy. [122 NLRB at 85.]

Clearly, these considerations have no application to the facts of the instant case.

stated, there was no violation of the Act by the Union when it called the strike in February 1970; hence there was nothing for the Union to "cure" in June 1970.[7]

Indeed, it is Respondent's basing of its argument on "retroactivity" which introduces the confusion. By applying our jurisdiction to all cases which exist at the time the new standards are announced, we are not in fact engaging in any "retroactive" application, in any sense of making conduct unlawful which previously was lawful. Rather, our application of the statute in such cases means only that our attention is now directed to conduct which previously escaped it. In deciding how to apply the statute to cases which arose but were not resolved before they engaged our scrutiny, we do not and indeed cannot unscramble all of the actions or steps the parties have previously taken. We must take the case in the posture in which we find it, and fashion remedies for such misconduct as we can, consistently with the purposes of the Act. Necessarily, this may leave intact some procedural matters, such as breaches of time limits, lack of notices, and the like, which have occurred well before our assertion of jurisdiction, and as to which a remedy would be essentially meaningless or futile.

The decision we have reached in this case fully comports with the policies and purpose of the Act. By its terms Section 8(d) (3) is designed to encourage efforts to effect the peaceful resolution of labor disputes through mediation and conciliation. This purpose was not frustrated by any conduct of the Charging Party here. On

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[7]Respondent's reliance on *Local Union 219, Retail Clerks International Assn.* v. *N.L.R.B.*, *supra*, is totally misplaced. There the Retail Clerks Union failed to proceed in conformity with Sec. 8(d) although it was clearly subject to the provision of that Sec. at the time it was called a strike.

the contrary, prior to the February strike the Charging Party gave notice to the then appropriate state agency, the Michigan Employment Relations Commission (MERC), and requested the intervention of that body. Pursuant to this notice and request MERC officials worked with the parties prior to and throughout the course of the strike and apparently were instrumental in bringing the strike to an end. As the Supreme Court has had occasion to point out, [8] our Act has the dual purpose of protecting the right of employees to engage in concerted activity while encouraging resort to peaceful substitutes for economic welfare. With this dual purpose in mind, and in light of all the circumstances of this case as discussed above, we are satisfied that any decision other than the one we have reached here would serve only to work an unwanted hardship on the employees involved, while failing to advance any discernible statutory design.

ORDER

Accordingly, the Board adopts the findings, conclusions, and recommendations of the Administrative Law Judge as contained in his Decision, reaffirms its prior Decision and Order set forth at 215 NLRB No. 24, and orders that Respondent Grand Lodge of Free and Accepted Masons, Masonic Home, Alma, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in said Decision and Order.

Dated, Washington, D.C. October 15, 1975.

John H. Fanning, Member
Howard Jenkins, Jr., Member
John A. Penello, Member
NATIONAL LABOR RELATIONS BOARD

(Seal)

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[8]See *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270 (1956).